

United States Government

Department of Energy

memorandum

DATE: September 15, 2000

REPLY TO: Office of Environmental Policy and Guidance:Koss 6-7964

ATTN OF:

SUBJECT: Update on Regulatory and Legal Developments Related to Air Emission Requirements for Hazardous and Mixed Waste Incineration and Vitrification Units

TO: Distribution

This memorandum provides an update to activities relating to the Environmental Protection Agency's (EPA's) hazardous waste combustor (HWC) rule and other EPA rulemaking activities that may affect treatment facilities for hazardous and mixed wastes, especially thermal treatment facilities. On September 30, 1999, (64 *FR* 52828), EPA issued Part II of a final rule under the Clean Air Act and the Resource Conservation and Recovery Act (RCRA) containing standards limiting emissions of certain pollutants from existing and new HWCs. The rule sets Maximum Achievable Control Technology (MACT) emission standards for three categories of HWCs, including hazardous waste incinerators. The emission standards are included in 40 *CFR* Part 63 Subpart EEE, "National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors". The Office of Environmental Policy and Guidance (EH-41) issued a guidance document on the HWC rule in December 1999 which can be accessed at: <http://tis.eh.doe.gov/oepa/guidance/caa/1569b.pdf>. The final rule issued on September 30, 1999, completed Phase I of the HWC rulemaking. Part I of the Phase I rulemaking was issued June 19, 1998, (63 *FR* 33782), and is discussed in an EH-41 regulatory bulletin issued in August 1998, which can be accessed at: <http://tis.eh.doe.gov/oepa/guidance/rcra/hwcombustors.pdf>. Certain portions of the December 1999 guidance document and the August 1998 regulatory bulletin are now out-of-date because of a July 25, 2000, court decision discussed below.

On June 27, 2000, (65 *FR* 39581), EPA issued a notice of data availability (NODA) for its future Phase II HWC rulemaking. The Phase II rule will cover hazardous waste burning boilers, halogen acid furnaces, and sulfuric acid recovery furnaces. The NODA presents for public comment the database that EPA plans to use to propose the Phase II MACT emission standards. No Department of Energy (DOE) facilities are included in the database. A mixed waste industrial boiler treatment facility operated by Diversified Scientific Services, Inc. (DSSI) is included in the database and will be potentially affected by the Phase II rule. The DSSI facility treats DOE liquid mixed wastes that are low activity and meet DSSI's waste acceptance criteria.

On July 10, 2000, (65 *FR* 42292), EPA issued technical corrections to its Phase I HWC MACT rule. The technical corrections correct errors and clarify certain requirements in Parts I and II of the Phase I rule. This notice can be accessed at: <http://eh.doe.gov/oepa/rules/65/65fr42292.pdf>. An earlier technical corrections rule was issued November 19, 1999 (64 *FR* 63209).

On July 12, 2000, (65 *FR* 42937), EPA issued a proposed rule that is indirectly related to the HWC rule. The proposed rule would revise certain treatment standards for spent potliners from primary aluminum reduction. The proposed rule also suggests that EPA

plans to regulate all vitrification units treating hazardous wastes under its regulations at 40 *CFR* 264 Subpart X for RCRA-permitted miscellaneous units. The proposed rule further proposes that, absent factors suggesting otherwise, vitrification units would be subject to the 40 *CFR* Part 63 Subpart EEE HWC emission standards. The RCRA/CERCLA Division (EH-413) of EH-41 issued a request for comment to DOE program and field offices on this proposed rule and plans to prepare a consolidated DOE response to the proposed rule for submission to EPA. The request for comment can be accessed at: <http://tis-nt.eh.doe.gov/oepa/comments/rcra/vitnotif.pdf>.

The Phase I HWC MACT rule amended the environmental performance standards applicable to miscellaneous units to provide that the RCRA permit for such units is to include those requirements included in 40 *CFR* 63 Subpart EEE that are appropriate (40 *CFR* 264.601; 64 *FR* 53075). Given the 40 *CFR* 264.601 requirement and the language in the July 12, 2000, proposed rule, it appears likely that EPA or authorized States will seek to apply the Phase I or forthcoming Phase II MACT emission standards for HWCs to vitrification units treating hazardous and mixed waste. The emission limitations in the MACT rule as well as other aspects of the rule such as continuous emission monitoring for carbon monoxide and hydrocarbons could be applied to such vitrification/miscellaneous units. Application of the MACT standards could come via direct regulation or by application of the omnibus provision in §3005(c)(3) of RCRA [codified at 40 *CFR* 270.32(b)(2)]. Under this provision, EPA or States with delegated authority from EPA can include in RCRA permits such terms and conditions as EPA or the State determines are necessary to protect human health and the environment. In addition, the Subpart EEE standards could potentially be applied to an onsite treatment facility at a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remediation site if they are found to be applicable or relevant and appropriate standards under §121(d)(2)(A) of CERCLA.

Finally, on July 25, 2000, the U.S. Court of Appeals for the District of Columbia issued a decision in the case of the Chemical Manufacturers Association and Cement Kiln Recycling Coalition v. EPA, 217 F.3d 861. The decision can be accessed at: <http://pacer.cadc.uscourts.gov/common/opinions/200007/99-1236a.txt>. In the decision, the Court of Appeals vacated portions of Part I of the Phase I HWC rule. In particular, the court vacated those portions of the Part I rule that required HWC owner/operators to: (1) cease burning hazardous waste two years after the effective date of the MACT emission standards (*i.e.*, on or before October 1, 2001) if the owner/operator did not intend to comply with the MACT emission standards, (2) prepare a progress report and submit it to EPA or the authorized State on or before October 1, 2000, if the owner/operator intended to comply with the MACT emission standards, and (3) submit a notification of intent to comply no later than October 2, 2000, to the applicable permitting agency stating whether the owner/operator intended to comply with the MACT emission standards. The basis for the court's decision was its finding that the early cessation program will not have demonstrated environmental or health benefits because hazardous wastes from HWCs that will close will continue to be combusted at other HWCs. The decision does not affect the requirement at 40 *CFR* 63.1206(a)(1) that owner/operators of affected facilities must comply with the Subpart EEE emission standards no later than September 30, 2002. Thus, under the decision, DOE facilities subject to the Subpart EEE emission standards that will not be upgraded to meet the

standards can continue to burn hazardous waste up to September 30, 2002, but must cease burning on that date. If the July 25, 2000, decision is changed as a result of appeals or further judicial reviews, EH-41 will notify DOE elements on the results of the appeal/review.

Questions concerning any of these developments relating to the 40 *CFR* 63 Subpart EEE regulations should be directed to Ted Koss of my staff (theodore.koss@eh.doe.gov; 202-586-7964), or to Beverly Whitehead of EH-413 (beverly.whitehead@eh.doe.gov, 202-586-6073). Questions on RCRA issues associated with this memorandum should in particular be directed to Ms Whitehead.

(original signed by Andrew Wallo)

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